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Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1416

DELTA COUNTY LEVEE IMPROVEMENT DISTRICT NO. 2, ET AL., *Petitioners*

v.

OBIE P. LEONARD, JR., ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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Supreme Court of the United States

OCTOBER TERM, 1974

NO._____

DELTA COUNTY LEVEE IMPROVEMENT DISTRICT NO. 2, ET AL., *Petitioners*

v.

OBIE P. LEONARD, JR., ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The Delta County Levee Improvement District No. 2, O. O. Woodward, Roy Emerson, and Goebel Templeton, individually and collectively as the Levee Improvement District's supervisors, and the Delta County Commissioners' Court, C. C. Oliver, J. L. Routt, H. D. Clark, Jr., Robert Anderson, Troy E. Kern, individually and collectively as the Delta County Commissioners' Court, Petitioners, request that a Writ of Certiorari issue to review the judgment of the Supreme Court of Texas delivered on December 4, 1974, in the above entitled case.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Texas is printed in Appendix B hereto, *infra*, p. 17, and is reported in

516 S.W.2d 911. It affirmed the judgment of the Court of Civil Appeals, Sixth District, printed in Appendix A hereto, *infra*, p. 11, and reported in 507 S.W.2d 333, which had reversed the judgment of the trial court (the District Court of Delta County, Texas).

JURISDICTION

The judgment of the Supreme Court of Texas was delivered on December 4, 1974. Petitioner's Motion for Rehearing was denied by said Court on January 15, 1975, without written opinion. On April 15, 1975, Mr. Justice Powell extended the time for filing this petition for a writ of certiorari to and including May 2, 1975. On May 2, 1975, Mr. Justice Powell further extended the time for filing this petition to and including May 12, 1975.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

(1) Is mandamus properly available to assignee bondholders who have waited some twenty to thirty years after default to compel the assessment and collection of taxes to discharge the bonded indebtedness reduced to judgment?

(2) Does the assessment and collection of such taxes, against landowners who have had no District assessment for at least twenty years, deprive such taxpayers of property without due process of law, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

(3) Should fundamental public policy prohibit the unjust enrichment of assignees of such bondholders where, as here, they purchased for $15,500.00 in 1954 the three

outstanding judgments dating back to 1942, together with some land and the bonds of the District, and now seek to collect some $240,000.00 through these mandamus proceedings?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

[a] Article 3773, Revised Civil Statutes of Texas, reads as follows:

"If no execution is issued within ten years after the rendition of judgment in any court of record, the judgment shall become dormant and no execution shall issue thereon unless such judgment be revived. If the first execution has issued within the ten years, the judgment shall not become dormant, unless ten years shall have elapsed between the issuance of executions thereon, and execution may issue at any time within ten years after the issuance of the preceding execution."

[b] The Fourteenth Amendment to the United States Constitution in pertinent part provides:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

STATEMENT OF THE CASE

In 1919, the Delta County Commissioners' Court created the Delta County Levee Improvement District No. 2 which shortly thereafter issued $120,000.00 worth of bonds to raise funds for the construction and maintenance of levees and other improvements in the District. The levees were not built, and at maturity neither the principal nor the interest was paid on the bonds. Judgments were

taken against the District in 1942, 1947, and 1951, in the District Court of Delta County, Texas, for the aggregate sum of $94,431.42, and were ultimately assigned to Respondents in 1954, along with some land and the bonds of the District, for a total consideration of $15,500.00. Judgments were purportedly kept alive by Respondents through obtaining writs of execution within ten years after rendition of judgment and within ten years after the preceding execution, in conformity with Art. 3773, Rev. Civ. Stat. of Texas. Respondents, as Plaintiffs, brought suit in 1971 against the Petitioners, as Defendants, seeking the issuance of a writ of mandamus to compel the levy and collection of taxes to pay off three judgment liens against the Defendant District. Trial of this suit was before a jury which rendered a verdict in favor of Petitioners on all issues. The trial court accordingly entered judgment that Plaintiffs take nothing and refused their application for writ of mandamus. This judgment was reversed and remanded by the Court of Civil Appeals with instructions to issue a writ of mandamus requiring the assessment and collection of taxes sufficient to pay off the judgment liens, and on appeal the Supreme Court of Texas affirmed. Copies of both these judgments are annexed hereto.

ARGUMENT

(1) Mandamus is an extraordinary remedy, involving the rights and responsibilities of public officials, and has therefore been available only in rare cases where the courts proceed with great caution. As Mr. Justice Brandeis said in *Duncan Townsite Co. v. Lane*, 245 U.S. 303, 311, 38 S.Ct. 99, 101, 62 L.Ed. 309:

> "Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the strict letter of the law but in disregard of its spirit. Although classed as a legal remedy, its issuance is largely controlled by equitable principles . . ."

Petitioners would show that mandamus in this instance would, in Mr. Justice Brandeis' words, be in flagrant disregard of the spirit of the law and would work a public mischief.

As the Supreme Court of Texas pointed out, the public policy of Texas exempts all political subdivisions performing governmental functions, including levee and improvement districts, from execution or garnishment proceedings. Although execution cannot accordingly be employed as a method of collecting or enforcing a judgment lien against the Petitioners in this case, the Texas Supreme Court holds that only by issuing a writ of execution, even against a political subdivision where it is unenforceable, can a judgment be kept alive every ten years. It is axiomatic that the law does not require the performance of a useless act, *Common Law*, 15A C.J.S., Sec. 14, pp. 69-70, but the Court clearly calls here for an incantation every ten years.

A more reasonable construction of Article 3773 would be that it requires the judgment creditor to obtain process which would be *legally effective* to collect his judgment *within the time set out in the statute*. In *Yett v. Cook*, 268 S.W.2d 715, 717 (1925), the Supreme Court of Texas

said that "the writ of mandamus is but the means or execution to enforce the judgment to whom the writ has been awarded." "Execution" in other words should be construed in Art. 3773 to be a writ which can properly enforce or collect a judgment. If the judgment is to be kept alive under Art. 3773, collection should be sought within the ten-year period through a method of enforcement which is effective; in fact, the one—mandamus—that has long been recognized to be the *only* means whereby a judgment against a public body can be lawfully enforced or collected, and not by the issuance of a writ which has heretofore been expressly held by the Texas Supreme Court to be unauthorized and against public policy.

It has been fifty-six years since the bonds were issued; it has been thirty-three years, twenty-eight years, and twenty-four years, since the respective judgments were rendered in the Delta County District Court against the defaulting Levee Improvement District. If the law has ever known of an unreasonable delay in seeking to assert one's undoubted rights, then surely this case is the archtype example. Statutes of limitation exist to compel the exercise of a right within a reasonable time. They are equally applicable in the case of political subdivisions. In such cases, they serve to protect the public treasury from attack many years after a claim may have arisen. Moreover, the threat of a suit might easily impair the performance of public rights and duties. Petitioners submit that such an unreasonable delay should defeat Respondents' right to mandamus, particularly when, as here, it will work injustice and operate harshly upon landowners of the 3200 acres that comprise this district.

(2) Although the first judgment was taken in 1937, the record in this case reveals no effort to collect it or any of the other judgments prior to their acquisition by Obie P. Leonard in 1954. Except for two years, 1938 and 1943, no taxes have been assessed. Under these circumstances, a property owner, or one seeking to buy land in the District, would reasonably be led to think that the judgments were dormant and a dead issue. Should a new generation of landowners, who have had no notice of any tax assessment made by the District since 1943, be burdened with taxes arising out of the issuance of bonds in 1919? Surely the landowners of the District have materially changed their position by purchasing property therein to their detriment, and now see the strong and immediate possibility of losing such investment because of a crushing tax burden.

> "The statute requires the county, if necessary, to levy a five-mill tax. If it fails to do so, it can be compelled by mandamus, as was done in Macon Co. v. Huidekoper, 134 U.S. 332, 10 Sup. Ct. 491. But the right given by the statute is the right to an annual levy of five mills. Any creditor can require this levy to be made each year. But can a creditor lie by supinely, permit years to elapse without complaint, and then demand at one time the ruinous levy of all taxes that might have been levied in the past? If that were permitted, how could men buy property with safety? Each year the property ought to bear its annual burden; but, if a ruinous accumulation of unlevied taxes can be cast upon it at the mere caprice of a creditor who was silent when he should have spoken, what safety can a man have in his possessions? It is reasonable to suppose that, since the year 1879 (now 18 years ago), a large part, perhaps a majority, of the property in Knox County has changed hands.

> Upon what just principle can the present owners, who acquired it free of lien, be required to pay the taxes that should have been paid years ago by the former owners? And, if the creditor can lie by for 18 years before seeking to enforce the levy and collection of a tax, what limit is placed upon his rights? Taxes that could have been easily met as they accrued from year to year, if suffered to accumulate in that manner, would fall with a crushing weight, and usually upon the innocent. I therefore conclude that the relator has no right to a mandamus, and that the demurrer to the response should be overruled. As it is apparent that the petition cannot be amended as to state a cause of action, it will be dismissed, and the defendants discharged, with costs." *Morton v. Kirk et al.*, (D.Ct. 1897) 79 F. 290, 291.

Since the judgments against the Delta County Levee Improvement District No. 2 are collectible only by exaction of taxes from property owners within the District, these people are, in consequence, the real parties at interest, and the question of laches should be viewed from their standpoint as well as from the standpoint of the District.

(3) The Respondents' suit is unconscionable, but that alone does not defeat a legal right enforceable by ordinary processes. Where, however, it is enforceable only by the extraordinary process of mandamus, which, as Mr. Justice Brandeis said, is largely controlled by equitable principles, the result may be different. Here, the Respondents, having already acquired 444 acres of land at a cost of less than $30.00 an acre, seek through these proceedings to collect $240,000.00 on a zero investment. With 3200 acres of land in the District the tax will be approximately $80.00 an acre if all owners in this rural area are able to pay the tax. But if some default, the tax burden could well

become so high that even in this time of inflated land values the Respondents will become owners of the entire District. This possibility is certainly a relevant factor in this proceeding which should be, and is largely, influenced by equitable considerations. Hopefully not putting the matter too rhetorically, the present landowners in this District are facing a crushing tax burden arising out of bond issues of some 56 years ago, purportedly to raise funds for the construction of a levee that was never built, and without responsibility or representation of any kind from them. Mr. Justice Frankfurter always believed that "due process" was a *living* principle, not confined to past instances, because "It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right." *Wolf v. Colorado* (1949), 69 S.Ct. 1359. Petitioners believe that the standard of what is reasonable and right in this case would prohibit the issuance a mandamus against the taxpaying landowners of the District. Again quoting Mr. Justice Frankfurter,

> "No single one of these circumstances alone would in my opinion justify a reversal. I cannot escape the conclusion, however, that in combination they bring the result below the Plimsoll line of 'due process.' " *Fikes v. Alabama* (1957), 77 S.Ct. 281.

CONCLUSION

Because this case presents sharply the question of appropriate judicial policy in civil cases against political subdivisions arising out of defaults in bond obligations of a generation ago, and also the question of unjust enrichment growing out of a thirty-odd year delay in seeking to collect on judgments against political subdivisions, it would plainly be in the public interest to settle these

questions by granting this Petition for the Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of May, 1975, a copy of the foregoing Petition for the Writ of Certiorari was served upon counsel for Respondents, Shannon, Gracey, Ratliff & Miller, 2700 Continental National Bank Building, Fort Worth, Texas 76102, by mailing same through the United States mail, postage prepaid.

BEN G. LEVY

APPENDIX A

COURT OF CIVIL APPEALS
Sixth District
Texarkana, Texas

No. 8214

Obie P. Leonard, Jr., Et al.
Appellants

v.

Delta County Levee Improvement District No. 2, Et al.
Appellees

Appeal from the District Court of Delta Co., Texas

PER CURIAM

This is a suit for writ of mandamus. Obie P. Leonard, Jr., R. W. Leonard, Margery Ann Hodges and Martha Jane Anthony, appellants (plaintiffs) brought suit against appellees (defendants), Delta County Levee Improvement District No. 2, O. O. Woodward, Roy Emerson and Goebel Templeton, individually and collectively as the Levee Improvement District's supervisors; Delta County Commissioners' Court, C. C. Oliver, J. L. Routt, H. D. Clark, Jr., Robert Anderson, Troy E. Kern, individually and collectively, as the Delta County Commissioners' Court, to require appellees to assess, levy or collect delinquent taxes or new taxes to pay off judgment liens against the district, which liens were owned and held by appellants. Trial was before a jury, and the jury rendered a verdict in favor of appellees on all issues. The trial court entered its judgment that appellants take nothing

and refused appellants' application for writ of mandamus. Appellants' motion for new trial was overruled and thereafter this appeal was duly perfected. Thirteen points of error are submitted for our consideration.

On July 23, 1919, the Delta County Commissioners' Court signed an order creating Delta County Levee Improvement District No. 2. Shortly afterwards, an election was held in which the voters of Delta County approved the issuance of bonds in the sum of One Hundred Twenty Thousand ($120,000.00) Dollars for the construction and maintenance of levees and other improvements in the district, and also approved the levying of a tax to pay the interest on the bonds and to provide a sinking fund for the retirement of the bonds at maturity. In the same year, the district issued bonds in the total sum of $120,000.00 in denominations of $1,000.00 each. Neither the principal nor the interest was paid on the bonds at maturity. Judgments were taken against the District by Elmer C. Smith and Fred F. Farrow on June 9, 1942, June 9, 1947, and January 15, 1951, in the District Court of Delta County for the respective sums of $35,022.17, $33,950.00, and $25,459.25. The judgments were ultimately assigned to appellants.

There is no issue in the case about the validity of the various assignments or that abstracts of judgment were properly issued, recorded and indexed.

The key issues in the case are whether or not the judgments had become dormant, whether the various writs of execution had been "issued" within the meaning of Article 3773, Tex. Rev. Civ. Stats., and whether the doctrine of laches is applicable.

Article 3773, supra, provides the following:

> "If no execution is issued within ten years after the rendition of a judgment in any court of record, the judgment shall become dormant and no execution shall issue, thereon unless such judgment be revived. If the first execution has issued within the ten years, the judgment shall not become dormant, unless ten years shall have elapsed between the issuance of executions thereon, and execution may issue at any time within ten years after the issuance of the preceding execution."

There is no question but that executions were actually obtained in each case within ten years after the rendition of each judgment, and subsequent executions were obtained within ten years after the preceding execution.

The evidence is undisputed that in Cause No. 4224 in the District Court of Delta County, appellants obtained a judgment for $35,022.17 on June 9, 1942, and that proper issuance of writs of execution was obtained on July 7, 1950, and February 11, 1966. Since the undisputed proof shows that these two writs of execution were delivered into the hands of the sheriff and returned "nulla bona," a presumption arises that the officer performed his duty with reference to the two writs of execution. *Carpenter v. Probst,* 247 S.W.2d 460 (Tex. Civ. App. San Antonio 1952, writ ref'd). There is no evidence to the contrary. The remainder of the writs of execution in the three district court cases (Causes Nos. 4224, 4524, and 4738) are in dispute. The evidence in connection with each writ of execution is virtually identical. The writs of execution were delivered to the sheriff of Delta County with instructions to return them "nulla bona." In each instance, some small investigation was made as to whether or not the district had any property and, upon finding no property, the writs were returned "nulla bona."

It is undisputed that the district did not own any property at any time when any of the writs of execution were delivered to the sheriff of Delta County. It is the settled law in this state that levee and improvement districts created under Sec. 59a of Art. XVI of the Texas Constitution and Statutes enacted thereunder are political subdivisions of the state, performing governmental functions, and as a matter of public policy are exempt from execution. *Willacy Co. Water Control and Improvement Dist. No. 1 v. Abendroth,* 177 S.W.2d 936 (Tex. Sup. 1944). It is therefore clear that execution cannot be employed as a method of *collecting* a judgment lien against the district in this case. However, Art. 3773, supra, is the only method provided by statute in Texas to keep a judgment from becoming dormant. The law requires that a writ of execution be issued to keep a judgment lien alive against a political subdivision even though it provides as a matter of public policy that the property of the district is not subject to execution to pay the judgments rendered against the district. (This is certainly a problem that needs legislative attention). In the instant case, even if the sheriff had found property belonging to the Delta County Levee District, he could not have levied execution upon the property, and the only return that he could have made upon the writ of execution would have been "nulla bona." We therefore hold that the writs were "issued" within the meaning of Art. 3773, Tex. Rev. Civ. Stats., and that such statute provided the only method in the instant case for precluding the judgments against the district from becoming dormant. The obtaining of the writ of execution from the clerk of the court, the placing of it in the hands of the local sheriff and his return of "nulla bona" within the prescribed times were the only requirements necessary to keep the

judgment liens alive against the district, even though the judgments could not be *collected* by the use of the writs of execution. "In the instant case the writ was delivered to the officer for the only service that was possible and under the circumstances, we think there was neither want of diligence nor lack of good faith." *R. B. Spencer & Co. v. Harris,* 171 S.W.2d 393 (Tex. Civ. App. Amarillo, 1943, writ ref'd).

The method for *collecting* judgments against political subdivisions exempt from execution is by writ of mandamus directing the political subdivision of the state to levy and collect sufficient taxes with which to pay the judgment or judgments when there is insufficient money on hand to pay the judgment debtors. *City of Austin v. Cahill,* 88 S.W. 542 (Tex. Sup. 1905).

The duty to levy and collect taxes is a continuing one of the political subdivision of the state that has borrowed money through the issuance of bonds or other evidence of indebtedness, and that same duty exists to pay judgments validly obtained against the political subdivision. Laches is not an affirmative defense which may be asserted under circumstances such as those existing in the instant case. When valid judgments were obtained against the district, and those judgments were kept alive by the issuance of writs of execution within the times prescribed by Art. 3773, supra, then the dominant duty is that of the political subdivision to pay the indebtedness, and the subordinate duty is that of the owner of the indebtedness to bring a suit for mandamus to compel the district to levy and collect sufficient taxes to pay the indebtedness. The duty of the district to pay is continuing. The time of bringing the mandamus suit to collect the debt is at the election of the owner of the indebtedness. As long

as the judgment or judgments do not become dormant, the doctrine of laches is not ordinarily available as an affirmative defense. It was particularly not available in the present case because there was no showing by the district that it had in good faith changed its position to its detriment as a result of the delay of appellants in bringing their suit for writ of mandamus. *The City of Fort Worth v. Johnson*, 388 S.W.2d 400 (Tex. Sup. 1964).

The trial court erred in failing to issue a writ of mandamus as prayed for by appellants. The judgment of the trial court is reversed and remanded with instructions to issue a writ of mandamus commanding appellees to assess, levy and collect delinquent taxes or new taxes sufficient to pay for judgment liens owned and held by appellants, plus interest and costs, within a reasonable time.

February 5, 1974

Filed February 5, 1974

APPENDIX B

IN THE
SUPREME COURT OF TEXAS

(Filed January 24, 1975)

NO. B-4590

DELTA COUNTY LEVEE IMPROVEMENT DISTRICT NO. 2, ET AL.,
Petitioners

VS.

OBIE P. LEONARD, JR., ET AL.,
Respondents

FROM DELTA COUNTY
SIXTH DISTRICT

Obie P. Leonard, Jr., and others brought this suit seeking a writ of mandamus requiring Delta County Levee Improvement District No. 2 and its supervisors to assess, levy or collect delinquent taxes or new taxes so that the judgment liens against the district that are held by the plaintiffs can be satisfied. The trial court entered judgment based on jury findings for the levee improvement district and refused the application for the writ of mandamus. This judgment was reversed and remanded by the court of civil appeals with instructions to issue a writ of mandamus requiring the assessment and collection of taxes sufficient to pay the judgment liens. 507 S.W.2d 333. We affirm the judgment of the court of civil appeals.

The opinion of the court of civil appeals fully states the facts, and we shall state them only briefly. Delta County Levee Improvement District No. 2 was created in 1919 and issued $120,000.00 worth of bonds for the con-

struction and maintenance of levees and other improvements. Neither the principal nor interest on these bonds was paid at maturity and several judgments were subsequently taken against the district. These judgments, abstracts of which were properly issued, recorded and indexed, were ultimately assigned to the plaintiffs.

When this suit was instituted by the judgment lien holders on August 20, 1971, the levee improvement district contended that the judgments on which the action was based had become dormant. There is no question that executions in accordance with Article 3773, Vernon's Tex. Rev. Civ. Stat., were actually obtained in the case of each judgment within 10 years after rendition, and subsequent executions were obtained within 10 years after the preceding execution, all of which were returned nulla bona. Based on these facts, the plaintiffs assert that the judgment liens in question have been kept alive in that they have complied with the only method provided by statute in Texas to keep a judgment from becoming dormant.

Public policy exempts political subdivisions of the state performing governmental functions from execution or garnishment proceedings. National Surety Corp. v. Friendswood Independent School District, 433 S.W.2d 690 (Tex. 1968); Willacy County Water Control & Improvement District v. Abendroth, 142 Tex. 320, 177 S.W.2d 936 (1944). Levee and improvement districts and similar entities created under Section 59(a) of Article XVI of the Texas Constitution fall within the category of political subdivisions of the state performing governmental functions and are likewise not subject to execution. Willacy County Water Control & Improvement District, *supra.*

Mandamus is the proper remedy by which the judgments can be enforced against a political subdivision

of the state. National Surety Corp. v. Friendswood Independent School District, *supra*. Through such means the political subdivision can be directed to levy and collect sufficient taxes to satisfy judgments outstanding against the entity when there are not sufficient funds on hand. City of Austin v. Cahill, 99 Tex. 172, 88 S.W. 542 (1905); Voorhies v. City of Houston, 70 Tex. 331, 7 S.W. 679 (1888).

Because of the status of the levee improvement district as a political subdivision and thereby not subject to execution, the defendants argue that the writs of execution relied upon by the judgment lien holders were of no force or effect and consequently the judgments are dormant. The act of issuing execution in this instance is assigned by the defendants as constituting a useless act. We do not agree that this reasoning is supported by the statutes and the available case law. As stated above, Article 3773, Vernon's Tex. Rev. Civ. Stat., provides that the only method the limitation period governing the validity of a judgment can be extended beyond 10 years is through the issuance of a writ of execution.

Although an execution is not the proper method of collecting on a judgment against a political subdivision, it is the means by which such a judgment can be kept alive to be subsequently enforced by a writ of mandamus. Article 3773 provides no other alternative. This conclusion can be inferred from the discussion of the facts in City of Austin v. Cahill, *supra* at 545. There the judgments against the City of Austin were not considered to be dormant because executions thereon had been duly issued and returned nulla bona before the 12-month limitation period then in effect; and the court allowed the judgments to be enforced without requiring their being revived through an action on the debt or resort to a writ

of *scire facias*. Such a result is compatible with the rule that funds of a political subdivision may not be reached by its creditors through execution of a judgment. The facts in the City of Austin v. Cahill, *supra* and those of the instant case involve a situation where there were no funds available with which to satisfy the judgments and the execution were issued only for the purpose of keeping the judgment alive by the statutory means available. The effect upon the status of a judgment by an execution that was not enforceable was also the controlling question in Grissom v. F. W. Heitmann Co., 130 S.W.2d 1054 (Tex.Civ.App.—Galveston 1939, writ ref'd). In that case a writ of execution was issued within 10 years of the issuance of the first writ, however, it was subsequent to the death of the judgment debtor upon whose estate no administration had been held. Under the statute then in effect, Article 3778, Vernon's Tex. Rev. Civ. Stat., subsequently superceded by Rule 625, Texas Rules of Civil Procedure, when a sole defendant dies after he has a a money judgment entered against him, execution shall not issue upon that judgment for such is to be satisfied only through proof and payment in the due course of the administration of the debtor's estate. In view of this statute, the court in *Grissom* held that the writ of execution was inoperative to satisfy the judgment, however, the execution was sufficient to keep the judgment alive and prevent its dormancy.

The writs of execution in question here were delivered to the sheriff of Delta County with instructions to return them nulla bona. In each instance some small investigation was made by the sheriff as to whether or not the district had any property and upon finding no property, the writs were returned nulla bona. In allowing execution under the circumstances presented in this case. no vio-

lence is done to the definition of "issuance" as contemplated by prior decisions. *See* Carpenter v. Probst, 247 S.W.2d 460 (Tex.Civ.App.—San Antonio 1952, writ ref'd). The preparation and issuance of an execution to keep alive rather than to collect a judgment against a political subdivision still amounts to an unconditional delivery of the writ of execution.

In the event that their argument that a single 10-year statutory period of limitation applies to writs of mandamus is not accepted, the levee improvement district contends that the circumstances of this particular case give rise to the defense of laches. The rule "equity follows the law" is well recognized and generally, in the absence of some element of estoppel or the like, the doctrine of laches will not bar an action before the limitation period has run. K & G Tool & Service Co. v. G & G Fishing Tool Service, 158 Tex. 594, 314 S.W.2d 782 (1958). It is undisputed that the levee improvement district was attempting to work out a settlement with the plaintiffs for a number of years. Such continued recognition and acknowledgement of a right would not raise an issue of estoppel. Barfield v. Howard M. Smith Co., 426 S.W.2d 834 (Tex. 1968). Furthermore, although the levee improvement district obtained a favorable jury finding to the effect that the delay in bringing this action was unreasonable, the district did not show that it had in good faith changed its position to its detriment as a result of the delay. City of Fort Worth v. Johnson, 388 S.W.2d 400 (Tex. 1964).

The judgment of the court of civil appeals is affirmed.

James G. Denton
Justice

Opinion delivered: December 4, 1974.

APPENDIX C

IN THE
SUPREME COURT OF TEXAS

(Filed January 15, 1975)

NO. B-4590

DELTA COUNTY LEVEE IMPROVEMENT
DISTRICT NO. 2, ET AL.,

VS.

OBIE P. LEONARD, JR., ET AL.

FROM DELTA COUNTY
SIXTH DISTRICT

Petitioners' motion for rehearing, filed in the above numbered and entitled cause on December 20, 1974, having been duly considered, it is ordered that said motion be, and hereby is, overruled.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUN 6 1975
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1416

DELTA COUNTY LEVEE IMPROVEMENT DISTRICT NO. 2, ET AL., *Petitioners*

v.

OBIE P. LEONARD, JR., ET AL., *Respondents*

RESPONDENTS' ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1416

DELTA COUNTY LEVEE IMPROVEMENT DISTRICT NO. 2, ET AL., *Petitioners*

v.

OBIE P. LEONARD, JR., ET AL., *Respondents*

RESPONDENTS' ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

STATEMENT OF THE CASE

Petitioners' (hereinafter referred to as "Levee Improvement District") statement of the case is correct but incomplete. The statement does not comply with U.S.Sup.Ct. Rule 23(f), 28 U.S.C.A. in that a review of a state court judgment is sought by Levee Improvement District's petition for a writ of certiorari, and nowhere does the statement of the case specify the stage in the proceedings in the District Court of Delta County, which is the court of first instance, nor in the

Appellate Courts at which, and the manner in which, the alleged federal question sought to be reviewed herein was raised. Respondents are hereinafter referred to as "the Leonards."

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

(1) There are no federal questions present in the case.

(2) The decision of the Texas Supreme Court is correct and in accordance with settled principles of law.

(3) The granting of a writ of certiorari would require the resolution of questions of fact decided adversely to Levee Improvement District in the Texas courts.

ARGUMENT IN SUPPORT OF REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

(1) THERE ARE NO FEDERAL QUESTIONS PRESENT IN THE CASE.

This case was tried before the District Court of Delta County, Texas, appealed to the Court of Civil Appeals for the Sixth District at Texarkana, Texas, and then to the Texas Supreme Court. At absolutely no time during this case at any stage of the proceedings has any question been raised concerning the validity of Article 3773, Vernon's Tex.Rex.Civ. Stat., nor has any claim been made that it was repugnant to the Fourteenth Amendment to the United States Constitution The filing of this petition for writ of certiorari is the first time in this case that validity of Article 3773, Vernon's Tex. Rev.Civ.Stat., has been drawn into question. That is, of course, the reason there has been no compliance with U.S.Sup.Ct. Rule 23(f), 28 U.S.C.A. It is well settled that the U. S. Supreme Court cannot decide issues which are for the first time raised in the petition for writ of certiorari, *Tacon v. Arizona,* 410 U.S. 351, 35 L.Ed.2d 346, 93 S.Ct. 998.

This case simply involved a procedural question of how to prevent a judgment against a political subdivision created

under Section 59a of Article XVI of the Texas Constitution, which would include a levee improvement district, from becoming dormant. The Texas Supreme Court held that since Article 3773, Vernon's Tex.Rev.Civ.Stat, clearly states that if a writ of execution is obtained within 10 years from date of judgment and every 10 years thereafter ". . . the judgment shall not become dormant. . . ." a judgment against the Levee Improvement District would not become dormant if this statute was complied with. It is undisputed that the Leonards complied with this statute by obtaining writs of execution within 10 years from date of judgment and every 10 years thereafter. This suit for mandamus was then brought to compel the levy and collection of taxes to pay the judgments. The Texas Supreme Court held (as did the Court of Civil Appeals) that the judgments were not dormant because Article 3773, Vernon's Tex.Rev.Civ.Stat., had been complied with, that mandamus was proper to collect the judgments and that the Levee Improvement District's defense of laches was inapplicable. Quite obviously, there is no federal question involved in this ruling and the Texas courts did not concern themselves with any federal question in deciding this case.

(2) THE DECISION OF THE TEXAS SUPREME COURT IS CORRECT AND IN ACCORDANCE WITH SETTLED PRINCIPLES OF LAW.

The levee improvement district bonds upon which the original judgments in this case were based state that the full faith, credit and resources of the Levee Improvement District are irrevocably pledged to the payment of the bonds and that a direct annual tax has been levied upon all taxable property in the Levee Improvement District sufficient to pay the interest on the bonds and the principle at maturity.

No effort was ever made by Levee Improvement District to pay either the principal or interest of the bonds at maturity, and none of the bond holders were ever paid. No tax was ever levied to pay the bonds. This is notwithstanding the fact that, as just stated, the full faith, credit and resources of the Levee Improvement District were irrevocably pledged to the payment of the bonds and a tax was to be levied to pay

the interest and principal at maturity. Clearly Levee Improvement District breached its obligation to the bond holders by not paying the principal and interest of the bonds at maturity. Because of the breach of this obligation the judgments in question were taken against the Levee Improvement District.

The statute involved in this case is Article 3773, Vernon's Tex.Rev.Civ.Stat., which reads as follows:

> "If no execution is issued within 10 years after the rendition of a judgment in any court of record, the judgment *shall become dormant* and no execution shall issue thereon unless such judgment be revived. If the first execution has issued within 10 years, the judgment *shall not become dormant,* unless 10 years shall have elapsed between the issue of executions thereon, and executions may issue at any time within 10 years after the issuance of the preceding execution." [Emphasis added]

There has never been any issue in the case about the validity of the various assignments or that abstracts of judgment were properly issued, recorded and indexed. To keep the judgments from becoming dormant, writs of execution were issued within 10 years after the rendition of each judgment and every 10 years thereafter in compliance with Article 3773, Vernon's Tex.Rev.Civ.Stat. This suit for mandamus was then brought to collect the judgments, it being well settled that such judgments can be collected by this means. *City of Austin v. Cahill.* 99 Tex. 172, 88 S.W. 542 (1905); *Voorhies v. City of Houston,* 70 Tex. 331, 7 S.W. 679 (1888); *National Surety Corp. v. Friendswood Independent School District,* 433 S.W. 2d 690 (Tex. 1968). The decision of the Texas Supreme Court was therefore in accord with the Texas law.

In *City of Austin v. Cahill,* supra, a mandamus proceeding was brought by a bond holder against the City of Austin to enforce payment by the City of Austin of an indebtedness partially reduced to judgment due the bond holder for interest accrued on certain water and light bonds issued by the city. The bond holder asked that a writ of mandamus be issued

to, among other things, compel the city of Austin to levy, assess and collect taxes to satisfy the judgment. The Texas Supreme Court, in ordering the writ of mandamus, said that ". . . the refusal to levy taxes to meet municipal obligations according to terms is a public wrong."

The United States Supreme Court, in the case of *East St. Louis v. Amy,* 120 U.S. 600 (1887), had an opportunity to consider a mandamus proceeding to require the mayor and council of East St. Louis to levy a tax to pay a judgment against the city for over $36,000.00. The judgment in favor of Amy was for interest on bonds issued by the city of East St. Louis and for the principal of one bond which had become due. The Circuit Court ruled that it was the duty of the city to levy and collect a direct annual tax sufficient to pay both the interest and the principal as it became due, and as this had not been done, an order was made requiring the levy and collection of a special tax to pay the judgment. This decision was affirmed by the U. S. Supreme Court. The Supreme Court, in affirming, stated:

> "The law required a tax to be levied annually sufficient to pay all interest as it accrued, and the principal when due. This was neglected, and consequently there is now a large accumulation of a debt which ought to have been paid in installments. Thus far the inhabitants have been allowed to escape taxation at the times it ought to have been laid, and to which they were under constitutional obligations to submit. The accumulation of the debt was caused by their own neglect as members of the political community which had incurred the obligation. * * *
>
> The constitutional obligation of the city was not fully met by providing, when the debt was incurred, for the levy and collection of the necessary tax. It required as well the actual levy and collection when needed to pay the debt. This is an obligation that can be enforced by mandamus after judgment caused by a neglect to meet its requirements."

Notwithstanding the clear provisions of Article 3773, Vernon's Tex.Rev.Civ.Stat., the Levee Improvement District argued that the judgments were dormant since the writs of execution could not be used to collect the judgments, and the judgments would therefore not support a writ of mandamus. The Texas Supreme Court disagreed, holding that although the judgments cannot be collected by a writ of execution, the obtaining of a writ of execution provides the only method by which a judgment can be kept alive to be subsequently enforced by mandamus. The argument made by Levee Improvement District has been made to the Texas courts before and rejected. In *Grissom v. F. W. Heilmann Co.*, 130 S.W.2d 1054 (Tex.Civ.App., writ ref'd, 1939) a writ of execution was issued against the judgment debtor within 10 years of the issuance of the first writ in compliance with Article 3773, Vernon's Tex.Rev.Civ.Stat. The judgment debtor had died before the writ was issued, however, and under the statute then in effect, Article 3778, Vernon's Tex.Rev.Civ.Stat., subsequently superseded by Rule 625, Texas Rules of Civil Procedure, when a sole defendant dies after he has a money judgment entered against him, execution shall not issue upon that judgment since the judgment must be satisfied only through proof and payment in the due course of the administration of the debtor's estate. The court in *Grissom* held that although the judgment could not be collected by the writ of execution because of Article 3778, Vernon's Tex.Rev.Civ. Stat., the execution was sufficient to keep the judgment alive and prevent its dormancy.

Levee Improvement District claims in its petition for writ of certiorari that laches is available to defeat the remedy of mandamus because of the lapse of time between the dates the respective judgments were rendered and the date this mandamus suit was brought.

Although there was a delay of years between the rendition of the judgments in this case and the filing of the suit for mandamus, this did not constitute an unreasonable delay under the facts of this case since there was a valid reason for the delay in filing the suit. The undisputed testimony in the

case was that representatives of the Leonards met with Levee Improvement District 25 or 30 times over a period of years to discuss the problem of collecting the judgments, and Levee Improvement District continually recognized that these were valid, binding judgments against Levee Improvement District, and Levee Improvement District wanted to try to settle the matter before a lawsuit was filed. As a matter of fact, Levee Improvement District even hired a delinquent tax attorney who was going to help collect delinquent taxes to pay the judgments. These discussions took place in the period of time between when the judgments were entered and when the suit for mandamus was filed. At no time during this period did Levee Improvement District ever indicate to the Leonards that it did not consider the judgments valid and binding. As a matter of fact, several of the supervisors of Levee Improvement District met with the Leonards' attorney and the levying and assessing and collecting of taxes in settlement of the judgments were discussed and the subject of the amounts of the assessments on a per acre basis was also discussed.

In summary, the uncontradicted and undisputed testimony was that Levee Improvement District recognized the fact that these judgments were outstanding against Levee Improvement District and were valid judgments, and Levee Improvement District was attempting to work with the Leonards in trying to solve the problem of how these judgments could be paid. The Supreme Court of Texas stated:

> "It is undisputed that the Levee Improvement District was attempting to work out a settlement with the plaintiffs for a number of years. Such continued recognition and acknowledgment of a right would not raise an issue of estoppel." [516 S.W.2d at pages 913 and 914; Appendix A to Levee Improvement District's petition for writ of certiorari at page 21]

The law in Texas is clear that the doctrine of laches is inapplicable when there is a continued recognition and ac-

knowledgment of the right, coupled with repeated promises to adjust the same upon which a party relies. *Nuckols v. Stanger,* 153 S.W. 931 (Tex.Civ.App., dism'd. 1913).

It is also undisputed that the Levee Improvement District never changed its position to its detriment in this case. The Texas Supreme Court specifically held that Levee Improvement District ". . . did not show that it had in good faith changed its position to its detriment as a result of the delay." 516 S.W.2d at page 914; Appendix A to Levee Improvement District's petition for writ of certiorari at page 21. Under applicable Texas law, Levee Improvement District had the burden of proof to show that it had in good faith changed its position to its detriment, *City of Fort Worth v. Johnson,* 388 S.W.2d 400 (Tex. 1964), and not only did Levee Improvement District fail to show this, Levee Improvement District did not even plead this in its pleadings in the case nor submit it to the jury; therefore, there was no evidence in the case of any good faith change of position by the Levee Improvement District to its detriment.

Levee Improvement District in its petition confuses landowners with Levee Improvement District and maintains that the landowners changed their position to their detriment. These are two separate entities and this distinction between the two must be kept in mind. The Texas Supreme Court held that it was the Levee Improvement District which must show that it had in good faith changed its position to its detriment as a result of the delay and, of course, as stated above, the Levee Improvement District failed to meet this burden. In its petition for writ of certiorari the Levee Improvement District keeps arguing that it was the landowners who supposedly changed their position as a result of the delay and fails to meet the real question, which is did the Levee Improvement District change its position. The issue of whether the landowners changed their position was not even before the trial court or the Texas appellate courts, so there is no evidence anywhere in the case that the landowners in any way changed their position by purchasing property. Of course, under Texas law the landowners would be charged

with knowledge of the judgments since they were properly abstracted and indexed in the Judgment Records of Delta County. *Thompson v. Clay,* 367 S.W.2d 917 (Tex.Civ.App., n.r.e. 1963). Also the tax records of Delta County have clearly shown all along that there are delinquent taxes outstanding against the property and, consequently, the property owners are charged with knowledge of these delinquent taxes.

Levee Improvement District complains that the amount of the judgment in this case is more than the Leonards paid for the assignments of the judgments. This allegation does not constitute a defense and the amount that was paid by the Leonards for the purchase of the judgments has absolutely nothing to do with the issuance of the bonds and the obligation to pay the bonds. Furthermore, it is quite obvious that the amount paid for the judgments is not material to any issue in the case and is not relevant to the case and is an attempt by Levee Improvement District to infer that the Leonards did not give sufficient consideration for the judgments when, in fact, there is good and legal consideration. As a matter of fact, the trial court struck these allegations from the pleadings of the Levee Improvement District, and no evidence was even allowed on this point.

There would of course be no judgment in this case if the Levee Improvement District had met its legal obligation by paying the bonds at maturity. If after the judgments were obtained the Levee Improvement District had paid the judgments, as it was under a legal obligation to do, no interest would have accrued on the judgments. Notwithstanding the fact that the Levee Improvement District continually recognized the validity of the judgments, it failed to pay the judgments, thereby allowing interest to accumulate. The Leonards are therefore certainly not responsible for the amount of the judgments. Again, as stated by the Supreme Court of the United States in *East St. Louis v. Amy,* supra, "The accumulation of the debt was caused by their own neglect as members of the political community which had incurred the obligation."

(3) THE GRANTING OF A WRIT OF CERTIORARI WOULD REQUIRE THE RESOLUTION OF QUESTIONS OF FACT DECIDED ADVERSELY TO LEVEE IMPROVEMENT DISTRICT IN THE TEXAS COURTS.

The granting of the writ of certiorari would necessarily entail the finding that there had been changes of position by the Levee Improvement District to its detriment when there is no evidence of this or a finding to the effect that the property owners materially changed their position when there is absolutely no evidence of this either. There would also have to be a finding that the meetings between the Leonards and the Levee Improvement District did not take place when in fact this is admitted by both sides. Finally, there has been no federal question raised at any point in state proceedings, so there would have to be some finding to the effect that a federal question was somehow raised when in fact it was not.

CONCLUSION

The Supreme Court of the United States should deny the petition for writ of certiorari because the validity of Article 3773, Vernon's Tex.Rev.Civ.Stat., was never drawn into question as being repugnant to the Fourteenth Amendment to the United States Constitution and the decision of the Texas Supreme Court in no way depended on the resolution of a federal question.

The petition for writ of certiorari should be denied for the further reasons that the decision of the Texas Supreme Court in this case was in every way correct in that the judgments were not dormant because the Leonards in all respects complied with Article 3773, Vernon's Tex.Rev.Civ.Stat., in that writs of execution were issued within 10 years from the date of judgment and every 10 years thereafter, and Article 3773, Vernon's Tex.Rev.Civ.Stat., clearly states ". . . the judgment ***shall not become dormant*** unless 10 years shall have elapsed between the issuances of execution thereon. . . ."

Laches has no place in this lawsuit since there was not a good faith change of position by Levee Improvement District to its detriment because of the delay in filing the suit. There was no evidence showing a good faith change of position and there was not even an issue submitted to the jury inquiring whether or not there was a good faith change of position by Levee Improvement District. Also, there was a continued recognition and acknowledgment of the Leonards' rights by Levee Improvement District.

Finally, this is a proper case for mandamus since the refusal to levy taxes to meet municipal obligations according to the terms of said obligations ". . . is a public wrong." *City of Austin v. Cahill,* supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of June, 1975, a copy of the foregoing reply to petition for writ of certiorari was served upon counsel for Petitioners, Mr. Ben G. Levy, 2244 West Holcombe Blvd., Houston, Texas, 77025, by mailing same through the United States mail, postage prepaid.

Eugene J. Dozier

Eugene J. Dozier